Filed 4/9/10 P. v. Bevilaqua CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. EDWARD U. BEVILAQUA, Defendant and Appellant.	D055162 (Super. Ct. No. SCD193827)

APPEAL from a judgment of the Superior Court of San Diego County, Charles R. Gill, Judge. Affirmed.

The San Diego County Grand Jury indicted Edward U. Bevilaqua, Charles V. Castro and Gregory A. High for securities fraud in connection with a Ponzi scheme involving the sale of investments in pay telephones, internet kiosks, and jukeboxes. The indictment named Bevilaqua in 30 of the 47 counts.

Bevilaqua pleaded guilty to count 8, engaging in a course of business which operated as a fraud in the sale of a security, and admitted the allegation that the victims' losses exceeded $2,500,000. In accordance with the plea agreement, the court dismissed the remaining charges against Bevilaqua in this case, all subject to Bevilaqua's waiver under *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*). It sentenced him to seven years in prison. In subsequent hearings, the court ordered Bevilaqua to pay $19,544,595. Castro and High also pleaded guilty, but are not parties to this appeal.

The sole issue on appeal is whether the court abused its discretion in assigning "all of the restitution" in this case to Bevilaqua. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The court found a factual basis for the plea based on its "significant review" of the 2,237-page grand jury transcript. Given the nature of Bevilaqua's challenge to the restitution order, we provide a description of the scheme based on grand jury testimony, then describe the evidence presented at the first of two hearings on victim restitution.

Bevilaqua, Castro and High were business associates engaged in selling and managing investors' interests in pay phones, internet kiosks and/or jukeboxes which they claimed to have placed in public locations in California and around the country. The fraud unfolded in several phases.

In the first phase, Castro brokered investments in pay phones through Interactive Technologies, Inc. and Sunbelt Marketing. High was Castro's "right hand man." Investors paid $6,500 per phone with the guarantee they would receive $65 per month in income.

The second phase began when the pay phone industry began to decline. Paystar Communications and Tri-Tech Communications, who installed and maintained the pay phones, informed investors that they could not make the promised monthly income payments and offered three options: (1) keep the pay phone and receive smaller monthly payments; (2) sell the pay phone at market price and take the loss; or (3) participate in the Diamond Program developed by Castro and Bevilaqua under which they could sell/exchange their pay phones on a one-to-one basis for public internet kiosks installed and maintained by Bevilaqua's Bikini Vending Company (Bikini Vending). Investors in the Diamond Program were promised $60 a month in income with the investment bonded for an additional fee. Bevilaqua and Castro told the investors that they had hundreds of kiosks up and running, and that the company would soon expand to Europe.

The third phase of the fraud involved the sale of internet kiosk investments by Castro's company, Network Services Depot (Network Services), to new investors through agents and advisors who sought investment opportunities to their clients. Again, Bikini Vending handled installation and management of the kiosks. Castro and Bevilaqua flew the agents to San Diego from around the country for "Red Carpet Days" where they presented terms similar to those offered to investors in the Diamond Program. The trips included a visit to the Bikini Vending facility in Escondido. On Bevilaqua's instructions, employees set up the warehouse to appear busy and made non-working kiosks look like they were ready for shipment. Bevilaqua and Castro promised the agents and advisors high commissions of up to $1,000 per kiosk sold.

In the last phase of the fraud, Bevilaqua began offering investment opportunities in jukeboxes at a purchase price of $10,950 per jukebox. Again, Bikini Vending was to install and manage the jukeboxes. Bevilaqua promised investors approximately $165 per month in income per unit.

Investors became suspicious when the monthly checks got smaller or stopped altogether. Those who invested in the pay phones discovered that many were missing - stolen, sold, or otherwise unavailable to be exchanged for the internet kiosks. As for the internet kiosks, Bikini Vending installed only a small fraction of those sold. Some were shipped to the assigned location but never connected to the Internet. In addition, listings of kiosk locations were false. If investors wanted to view a kiosk, Bevilaqua instructed his staff to say that one of the few installed kiosks belong to them. As a result, multiple investors were told they owned the same kiosk. Bevilaqua also failed to install most of the jukeboxes he sold. Sometimes the purported location of the jukebox did not even exist.

Bevilaqua used various tactics to conceal the fact that monthly income payments came from proceeds of sales to new investors. In general, investors did not receive the minimum monthly payment promised in their contract. If someone complained, Bevilaqua instructed staff to tell the investor that profits would improve in the future. If that did not work, Bevilaqua told staff to increase the monthly payments slightly to appease that investor.

Finally, in March 2004, employees at Bikini Vending informed Castro that the company was hopelessly behind in installing the kiosks and could not possibly catch up. Castro reported Bevilaqua and Bikini Vending to the FBI, claiming he had no knowledge or involvement in Bevilaqua's unlawful scheme.

The FBI froze Bikini Vending's bank accounts following a search of the Escondido facility. The California Department of Corporations named Bevilaqua and Castro in a cease and desist order in July 2004 which alleged violations of California securities laws. The ensuing investigation revealed that: (1) Bevilaqua and Castro sold 3,433 kiosks to 433 investors; (2) 306 people participated in the Diamond Program as purchasers of the pay phones; and (3) 14 people purchased 52 jukeboxes. Most of the victims of the fraud were retired and living on fixed incomes. Many lost their life savings and some were forced to return to work.

At the restitution hearing held on March 27, 2009, Federal Trade Commission (FTC) staff attorney, Lisa Rosenthal, testified about the FTC action against Network Services and Bikini Vending. Rosenthal stated that the $1.5 million seized by the FBI was subject to civil forfeiture and transfer to the FTC. She stated that the FTC had frozen assets of Castro and High totaling $770,000 which were also available for consumer restitution. Rosenthal testified about a spreadsheet prepared by the FTC which identified the victims, how much they paid for the kiosks and jukeboxes, and their pro rata share of any distribution. The spreadsheet also listed the "Diamond Clients." According to the FTC, documented losses for the sale of kiosks and jukeboxes totaled approximately $20.6 million. The court admitted the spreadsheet into evidence over defense objections.

The court rejected defense counsel's argument that Castro controlled the money and Bevilaqua was responsible for less than half of the amount lost by the victims, stating: "[I]n this particular case, where there were three defendants and their actions were joint in some manner . . . they all profited from their joint actions by receiving money, [and] I believe that California courts recognize that they all could be held responsible for the entire amount." The court indicated that it would subtract from the total amount of restitution: (1) the amount Castro and High stipulated to pay in restitution as part of their plea bargains and (2) the funds already seized by the FBI to be distributed through the FTC action.

DISCUSSION

Penal Code section 1202.4, subdivision (f) authorizes victim restitution and reads in part: "[I]n every case in which a victim has suffered economic loss as a result of the defendant's conduct," the trial court must order the defendant to make "full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record." (Undesignated statutory references are to the Penal Code.) The court shall base its order for victim restitution "on the amount of loss claimed by the victim or victims or any other showing to the court." (§ 1202.4, subd. (f).) The order must "fully reimburse the victim or victims for every determined economic loss incurred as a result of the defendant's criminal conduct . . . ." (§ 1202.4, subd. (f)(3).) If the court orders victim restitution in a case in which it sentenced the defendant to prison rather than probation, section 1202.4 limits restitution to "those losses arising out of the criminal activity that formed the basis of the conviction." (*People. Woods* (2008) 161 Cal.App.4th 1045, 1049-1050.) Thus, section 1202.4 makes clear that restitution must be based on the victim's total economic loss, not on the amount the defendant profited as a result of his crime. (See § 1202.4, subd. (f)(3)(A)-(K).)

The trial court has broad discretion in choosing how to calculate the amount of restitution but the method must be rationally designed to determine the victim's economic loss. (*People v. Giordano* (2007) 42 Cal.4th 644, 663-664 (*Giordano*).) The defendant is entitled to a hearing to challenge the amount of restitution awarded. (§ 1202.4, subd. (f)(1).) We review the award of victim restitution for abuse of discretion. (*Giordano, supra*, 42 Cal.4th at p. 663.) The trial court abuses its discretion if its restitution order is arbitrary or capricious (*People v. Akins* (2005) 128 Cal.App.4th 1376, 1382) or based on a demonstrable error of law (*People v. Jennings* (2005) 128 Cal.App.4th 42, 49). However, """[w]hen there is a factual and rational basis for the amount of restitution ordered by the trial court, no abuse of discretion will be found . . . .""" (*People v. Prosser* (2007) 157 Cal.App.4th 682, 686.) If the circumstances reasonably justify the court's findings, we may not overturn the order on grounds the circumstances might support a contrary finding. (*Id*. at pp. 686-687.) In other words, we do not reweigh or reinterpret the evidence but simply determine "'whether there is sufficient evidence to support the inference drawn by the trier of fact.' [Citation.]" (*Ibid.*)

Bevilaqua presents three arguments in support of his claim the trial court abused its discretion. He claims the $19,544,595 restitution order (1) does not reflect his criminal liability; (2) does not account for amounts Castro and High actually paid to the victims; and (3) violates the Eighth Amendment bar to excessive fines. We consider and reject each argument in turn.

I. *The Award Reflects Bevilaqua's Role in the Fraud*

Bevilaqua maintains he was liable for no more than $4 million - the $8 million in investor assets received by Bikini Vending minus: (1) the $1.5 million seized by the FBI; (2) the $770,000 in assets frozen by the FTC; and (3) the $2.5 million that Bikini Vending paid to investors. He acknowledges that the *Harvey* waiver allowed the court to consider the counts dismissed against him, but contends the court misapplied section 1202.4 by holding him responsible for losses suffered by investors in the 14 counts that did not apply to him. In support of this contention, Bevilaqua cites section 1202.4, subdivision (f)(3) which provides for full reimbursement "for every determined economic loss *incurred as a result of the* *defendant's criminal conduct.*" (Italics added.) We conclude there is no merit in Bevilaqua's arguments.

Under section 1202.4, the court must base the restitution award on the victims' total economic loss, not the different levels of the codefendants' culpability. (*People v. Madrana* (1997) 55 Cal.App.4th 1044, 1051; *People v. Zito* (1992) 8 Cal.App.4th 736, 746.) By pleading guilty and signing the *Harvey waiver*, Bevilaqua admitted his responsibility for those losses. "He [was] therefore 'culpable' and [was] responsible for the full amount of the victim's losses. Accordingly, his obligation to pay does not hinge upon the culpability of his codefendant[s]." (*People v. Zito*, *supra*, 8 Cal.App.4th at p. 746, citing § 1016, subd. (3).)

Thus, Bevilaqua's plea and *Harvey* waiver authorized the court to order restitution for all the victims of the fraudulent sale of internet kiosks and jukeboxes. He pleaded guilty to count 8 which alleged that he and both codefendants violated Corporations Code section 25541 by offering and selling the fraudulent investments in internet kiosks through Network Services and Bikini Vending between March 2001 and March 2004. Although Bikini Vending's assigned role was to install and manage the kiosks, Bevilaqua took an active role in marketing the units to participants in the "Diamond Program" and to the agents and investment advisors he and Castro flew to San Diego for "Red Carpet Days." Bevilaqua was also instrumental in efforts to conceal the fraud from suspicious investors. The *Harvey* waiver also allowed the court to consider the facts underlying count 33 which alleged that Bevilaqua and both codefendants violated Corporations Code section 25541 by offering and selling fraudulent investments in jukeboxes through the same companies between August

2002 and February 2004. Again, the record shows that Bevilaqua took an active role in marketing the jukeboxes, most of which were never installed.

We reject Bevilaqua's argument that the court should have subtracted the $2.5 million Bikini Vending purportedly paid investors from the approximately $20 million loss identified by Rosenthal at the restitution hearing. The grand jury testimony cited by Bevilaqua does not support this claim. Although the expert who analyzed the bank accounts testified that "individual disbursements" totaling $2.5 million were drawn on the Bikini Vending bank account, she did not know whether the checks went to individuals who were investors. Accordingly, the court did not abuse its discretion in omitting those disbursements from its calculation of the restitution amount.

II. *The Award Reflects Payments Made by Castro and High*

Next, Bevilaqua contends that the restitution award failed to account for restitution actually paid by Castro and High. He argues that the trial court intended to hold Bevilaqua and his codefendants jointly and severally liable, but failed to amend the restitution order to include payments they made as part of their plea bargains. The record does not support Bevilaqua's contention.

When entering his guilty plea, Castro agreed to restitution in the amount of funds frozen at Fullerton Community Bank and Union Bank in his name, the name of his companies, and the name of another individual. High agreed to restitution in "the sum of $160,000.00 that is a portion of his bank accounts at Fullerton Community Bank and Union Bank." Rosenthal testified that the FTC froze approximately $770,000 in bank accounts belonging to Castro and High. The amended restitution order filed on May 4, 2009, states that the funds from those bank accounts were included in the $2,339,925 that the FTC planned to distribute to the victims. The court properly subtracted that amount from total losses to reach the net sum to be paid by Bevilaqua.

III. *The Amount of Victim Restitution Is Constitutional*

Bevilaqua maintains that the restitution order violates the Eighth Amendment because it was excessive and did not bear a rational relationship to his amount of fault. However, victim restitution does not fall within the ambit of the Eighth Amendment's Excessive Fines Clause because it is not a punitive fine.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." (U.S. Const., 8th Amend.) It limits the government's power to extract cash payments as *punishment* for an offense. (*United States v. Bajakajian* (1998) 524 U.S. 321, 327-328, italics added.) Thus, the amount of a punitive forfeiture "must bear some relationship to the gravity of the offense that it is designed to punish" and is unconstitutional "if it is grossly disproportional to the gravity of a defendant's offense." (*Id*. at p. 334.)

Unlike restitution fines, victim restitution is not defined as punishment. (*People v. Harvest* (2000) 84 Cal.App.4th 641, 647.) "It is true that both forms of restitution share an identical statutory basis. (Former Gov. Code, § 13967; Pen. Code, § 1202.4.) But whereas 'restitution fines are imposed only upon conviction of a criminal offense' [citation], victim restitution is a civil remedy which does not require a criminal forum. [Citations.] The governing statutes specify that an order for victim restitution may originate from criminal court, but expressly recognize that such an order 'shall be enforceable as a civil judgment.'

(Former Gov. Code, § 13967, subd. (c); Pen. Code, § 1202.4, subds. (a)(3)(B) & (i).) It therefore contemplates that subsequent enforcement efforts may occur outside the context of the criminal law. (See Pen. Code, § 1202.4, subd. (h).)" (*Ibid*.) Accordingly, we conclude there was no constitutional violation.

DISPOSITION

The judgment is affirmed.

McINTYRE, J.

WE CONCUR:

NARES, Acting P. J.

O'ROURKE, J.